No. 164.

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JAMES H. McKENNEY,
Clerk.

Motion Papers.

PETITION AND MOTION FOR CERTIORARI.

Filed Nov. 14, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 164.

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JOE KIRBY, PLAINTIFF IN ERROR,

*vs.*

THE UNITED STATES.

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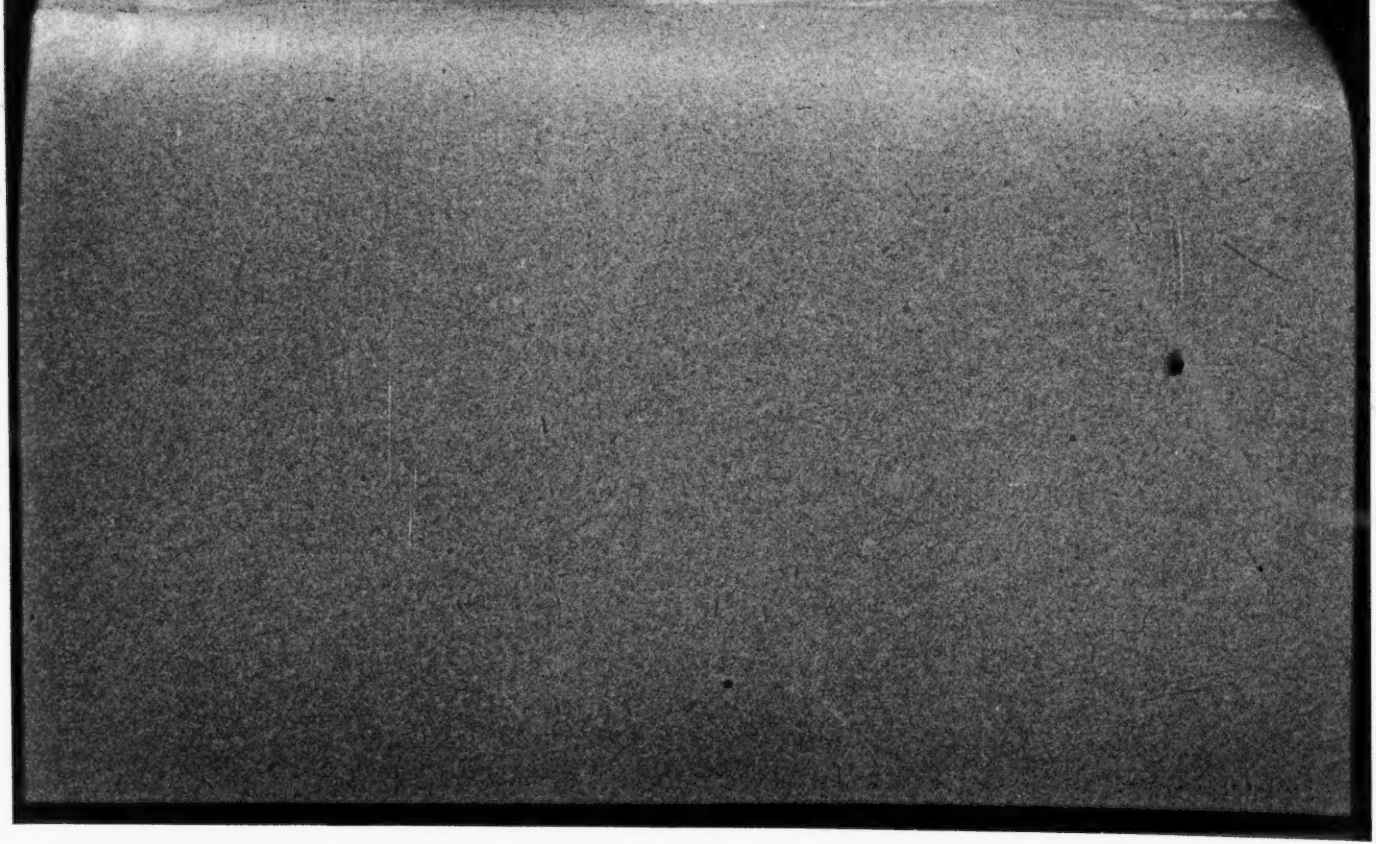
IN ERROR FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.



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# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1898.

IN ERROR FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

JOE KIRBY, Plaintiff in Error,
*vs.*
THE UNITED STATES.
No. 164.

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## MOTION AND PETITION FOR CERTIORARI.

*To the Honorable, the Supreme Court of the United States:*

And now comes the Plaintiff in Error and suggests to the court here that the record as certified to this court does not correctly state all the matters and things purported to be certified, and omits to state certain material matters which are essential to the proper consideration of the questions presented by the writ of error to this court for review upon the exceptions taken by the Plaintiff in Error at the time of his trial in the district court for the district of South Dakota. And thereupon the Plaintiff in Error shows:

I. That the statement upon the 9th page of the printed record that "the jury being sworn in said cause, counsel for the defendant files a motion to discharge the defendant for the reason that the defendant has already been placed in jeopardy for the offence for which he is now to be tried", is not a correct statement in this that the said motion to discharge the Plaintiff in Error, to be found on pages sixteen and seventeen of the record was in fact filed, heard and over-ruled by the court before the jury was sworn, as appears from the annexed affidavits.

II. Also in that it appears upon page eighteen of the record that the Plaintiff in Error filed a motion in arrest of judgment, and in support of the 7th clause thereof, and submitted certain affidavits of the jurors who rendered the verdict. That upon presenting said motion in arrest of judgment, the court, upon motion of the United States District Attorney, struck out said 7th clause and refused to consider the same, to which ruling the Plaintiff in Error duly excepted, as appears by page twelve of the record, and that this court cannot pass upon the matter of said exception as presented by

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Assignment of Errors XXI and XXII, page 107 of the printed, without said affidavits being certified in the record. The said record does not certify said affidavits to this court, although

they are still existing among the files of the case in said district court and in the custody and control of the clerk thereof, copies of which affidavits are hereunto attached as a part of this motion.

III. In that it appears all the matters and things mentioned in the said plea of former jeopardy as set forth on pages sixteen and seventeen of the printed record, appear of record in this case in the trial court, and that the record of the trial court in this action shows that on the twenty-third of April, 1897, upon the former trial of this action, upon the plea of not guilty to the same indictment as is and was used upon the trial of the present action, which former trial resulted in a disagreement of the jury charged with said trial, said jury were brought into court, discharged from the further consideration of said case, which said discharge of the jury at that time Plaintiff in Error claims was ordered by the court during his absence and the absence of his counsel, and without his consent and against his wish and desire, and that the discharge of the jury the Plaintiff in Error insists was improper for that reason and otherwise, and hath ever claimed that he was thereby placed in jeopardy by the fact of that trial and was entitled to a discharge from further liability on account of said indictment, and said discharge of the jury being without his knowledge of consent and without good or sufficient cause therefor, all of which at large and more fully appears from the records of said court still existing, and the Plaintiff in Error is advised that the case cannot properly be considered in this court unless this court shall have before it the record of said former
3 trial, none of which has been certified in the record to this court.

WHEREFORE, the Plaintiff in Error prays that a writ of certiorari issue out of this court directed to the said district court of the district of South Dakota and the clerk thereof, requiring said court and clerk to certify truly to this court as to all the matters and things above set forth, and that the record as now certified be returned to said court for correction in the particulars mentioned.

And the Plaintiff in Error further shows that the transcript of record was not printed in this case until after the adjournment of the last term of court, that until the fifteenth day of September, inst., the Plaintiff in Error and his counsel all resided at Sioux Falls in the State of South Dakota, and until the printing of the record it could not be conveniently examined, and the contents thereof were, until said record was so printed, unknown to the Plaintiff in Error and his counsel.

JOE KIRBY,
*Plaintiff in Error.*

CHARLES O. BAILEY,
A. G. SAFFORD,
*Of Counsel.*

STATE OF SOUTH DAKOTA, } ss.
*County of Minnehaha,* }

I, Joe Kirby, being first duly sworn do on oath depose and say that I am the Plaintiff in Error in the above entitled proceeding

and that I know the contents of the foregoing and that the facts therein stated are true of my own knowledge.

JOE KIRBY,

Subscribed and sworn to before me this twenty-third day of September, 1898.

4 [NOTARIAL SEAL.] J. M. DONOVAN,
*Notary Public, S. D.*

UNITED STATES OF AMERICA, } ss.
*District of South Dakota,* }

In District Court Thereof, Southern Division.

UNITED STATES, }
*vs.* }
JOE KIRBY. }

G. S. HINES, being duly sworn on oath, deposes and says that he was one of the jurors duly empanelled, sworn and charged in the above entitled action on the 8th day of June, 1897.

That on the 12th day of June, 1897, said jury after deliberation appeared in court, and being interrogated by the court or by the clerk thereof as to whether they had agreed upon a verdict and being answered in the affirmative by the foreman thereof, the jury then being required to do so through their foreman, declared the verdict.

That the verdict as affiant remembers was and is in the following form:

"We, the jury, find the defendant guilty as charged in the first count of the indictment."

That said verdict upon being declared was received by the court and entered upon the minutes thereof.

That as this affiant is now advised said verdict contains and embraces among other things the following Finding of Fact, to-wit:

"That the defendant received the alleged stolen property in
5 said indictment with the intent to convert the same to his own use," or that in substance.

That if such be the fact that said verdict does embrace and make the foregoing Finding of Fact, the same is not and was not the verdict which this affiant agreed upon in the jury room and was not and is not the verdict of the jury.

That the verdict which the jury agreed to and which they sought to return to the court was and is in substance that the defendant had in his possession the alleged stolen property knowing the same to be stolen and that the jury through their foreman sought to express in the foregoing form of the verdict given on the first page of this affidavit the verdict as just above stated. And it was sought by the jury to express in the verdict as finally declared and received by the court their agreement and verdict in substance that the defendant was guilty of having in his possession the alleged stolen property with the knowledge that the same was stolen.

Affiant further states that the jury had no means of knowing what the first count of the indictment charged except the knowledge they

derived from hearing the indictment read at the commencement of the trial and from instructions of the court subsequently delivered. That no copy of said inditment was furnished to the jury, nor used in the jury room during their deliberations.

That if the verdict as declared and received is construed to contain the finding of the intent to apporpriate such stolen property to his own use by the defendant the same is a misunderstanding by the court as to the meaning the jury sought to convey by the verdict as declared and that if such verdict as declared and received bears such construction the same was and is an erroneous declaration of the actual verdict rendered. and that the entry is not and was not the verdict of the jury.

That the verdict of the jury is and was that the defendant had in his possession the alleged stolen property with knowledge that the same was stolen, or that in substance, and not that the defendant received said stolen property with intent to convert the same to his own use.

Affiant further states that this affidavit is made in absolute and perfect good faith, and to the sole and single purpose that justice may be done.

G. S. HINDS.

Signed and sworn to befere me this 19th day of June, 1897.

[NOTARIAL SEAL.] JOHN C. KLEMME,
*Notary Public, S. D.*

(Endorsed:) Filed June 22nd, 1897. O. S. Pendar, clerk.

UNITED STATES OF AMERICA, } ss.
*Eighth Judicial Circuit, District of South Dakota,* }

I, Oliver S. Pendar, clerk of the district court of the United States of America, in and for the district of South Dakota, do hereby certify, that I have carefully compared the foregoing copy with the original hereof which is in my custody today as such clerk, and that such copy is a correct transcript from such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Sioux Falls, in said district, this 8th day of December, A. D., 1897.

OLIVER S. PENDAR.
*Clerk.*

UNITED STATES OF AMERICA, } ss.
*District of South Dakota,* }

In District Court Thereof, Southern Division.

UNITED STATES, }
*vs.* }
JOE KIRBY. }

STATE OF SOUTH DAKOTA, } ss.
*County of Moody.* }

I, the undersigned, being first duly sworn, do on oath depose and

say; that I am one of the jurors duly empannelled and sworn and charged in the above entitled action on the 8th day of June, 1897, and that neither the indictment or any copy thereof was furnished to the jury, and that no means was given said jury or any of the
7 jurors by which to determine what was charged in the respective counts thereof; that I heard the word "count" used by the defendant in his objection to the evidence and also heard the word "count" used by the court, and that the court instructed us, as I understood it, that there was four counts therein submitted to the jury on which to pass, and that if we found them all against the defendant we should find him guilty as charged in the indictment that had been read to us; that each of said counts as I understood the court to charge us was as follows:

*First*, Were the stamps mentioned in the indictment stolen from the post office at Highmore?

*Second*, Were the parties who stole the stamps from the post office at Highmore, convicted at Deadwood?

*Third*, Did the defendant receive those stamps knowing them to be stolen?

*Fourth*, Did the defendant intend to convert said stamps to his own use?

That affiant understood that each of said charges as above named constituted a count in said indictment; that upon the jury retiring to deliberate upon the close of the trial, the vote of the jury as to whether we should find the defendant guilty as charged in the indictment, was a major portion of the time six each way, and that part of the time seven of the jury voted "Not Guilty." That said jury and the different members thereof in said voting as your affiant understood it, never intended to find that said defendant ever intended to convert any of said stamps to his own use or gain. That finally, about five o'clock on June 12th, 1897, the jury being unable to agree upon a general verdict, prepared a special verdict, to which in the jury room they all agreed, which special verdict was reported into court and entered upon the minutes of the court under the direction of the jury, but thereafter and before the jury was discharged
8 from the case one of the jurors, Mr. Glass, dissented. That at the time said special verdict was reported as aforesaid the court made some remark about whether the jury intended to find the defendant guilty as charged in the first count of the indictment; that as said special finding did not in any manner find the befendant guilty of intending to convert to his own use or gain the alleged stolen property or any part thereof, your affiant understood the remark of the court as meaning, that we could arrive at the same result as our special finding indicated by finding the defendant guility as charged in the first count; that on returning to the jury room your affiant believed, and has reason to believe from the remarks and conversations had with his fellow jurors, that several if not all of his fellow jurors, believed that the charges against the defendant of intending to convert said alleged stolen property or any part thereof to his own use on gain was not included in the first count of said indictment, and that it was the intent of this affiant, and as he believes of all his fellow jurors, that by returning a verdict of guilty as charged in the first count, they would not find the defendant guilty

of intending to convert the property alleged in the indictment to be stolen or any part thereof to his own use or gain: that upon returning to the jury room the last time after having rendered such special verdict as aforesaid, Mr. Glass insisted that he should want to find two of the counts as above indicated against the defendant; that none of said jurors thereupon attempted, or as your affiant has reason to believe, intended to find that the defendant intended to convert said stolen property or any part thereof to his own use or gain; that thereupon we agreed upon the state of facts which we found against the defendant as stated in our special verdict and no more, and
9 thereupon upon coming into court the last time when the verdict of guilty was announced, the foreman of said jury announced said verdict of guilty as charged in the first count; that it was at all times the intent of said foreman and the understanding and agreement of said jurors that said verdict did not and should not exceed in its findings that found in the special verdict and that your affiant never learned until after said jury had been discharged that it was the claim of the prosecution that by returning the verdict of guilty that we in effect found that defendant intended to convert said property to his own use or gain. That if such is the legal effect of said verdict such verdict is a mistake and does not express the facts as agreed to by said jury in the jury room; that said jury never agreed that the said defendant intended to convert said stamps or any part thereof to his own use or gain; your affiant says that in his opinion there was no evidence whatever that would justify him under his oath as a juror either directly or indirectly of finding defendant guilty of intending to convert said stamps or any part thereof to his own use or gain.

JOHN RICE.

Signed and sworn to before me this 18th day of June, 1897.
[NOTARIAL SEAL.] F. L. ROWLAND,
*Notary Public, S. D.*

(Endorsed:) Filed June 22nd, 1897. O. S. Pendar, clerk.

UNITED STATES OF AMERICA, } ss.
*Eighth Judicial Circuit, District of South Dakota,* }

I, Oliver S. Pendar, clerk of the district court of the United States of America, in and for the district of South Dakota, do hereby certify, that I have carefully compared the foregoing copy with the original hereof which is in my custody today as such clerk, and that such copy is a correct transcript from such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Sioux Falls, in said district, this 8th day of December, A. D., 1897.

OLIVER S. PENDAR.
*Clerk.*

[Seal.]

UNITED STATES OF AMERICA, } ss.
*District of South Dakota,* }

In District Court Thereof, Southern Division.

UNITED STATES, }
*vs.*
JOE KIRBY. }

STATE OF SOUTH DAKOTA, } *ss.*
*County of Aurora.* }

I, the undersigned, being first duly sworn, do on oath depose and say; that I am one of the jurors duly empannelled and sworn and charged in the above entitled action on the 8th day of June, 1897, and that neither the indictment or any copy thereof was furnished to the jury, and that no means was given said jury or any of the
10 jurors by which to determine what was charged in the respective counts thereof; that I heard the word "count" used by the defendant in his objection to the evidence and also heard the word "count" used by the court, and that the court instructed us, as I understood it, that there was four counts therein submitted to the jury on which to pass, and that if we found them all against the defendant we should find him guilty as charged in the indictment that had been read to us; that each of said counts as I understood the court to charge us was as follows:

*First*, Were the stamps mentioned in the indictment stolen from the post office at Highmore?

*Second*, Were the parties who stole the stamps from the post office at Highmore, convicted at Deadwood?

*Third*, Did the defendant receive those stamps knowing them to be stolen?

*Fourth*, Did the defendant intend to convert said stamps to his own use?

That affiant understood that each of said charges as above named constituted a count in said indictment; that upon the jury retiring to deliberate upon the close of the trial, the vote of the jury as to whether we should find the defendant guilty as charged in the indictment, was a major portion of the time six each way, and that part of the time seven of the jury voted "Not Guilty." That said jury and the different members thereof in said voting as your affiant understood it, never intended to find that said defendant ever intended to convert any of said stamps to his own use or gain. That finally, about five o'clock on June 12th, 1897, the jury being unable to agree upon a general verdict, prepared a special verdict, to which in the jury room they all agreed, which special verdict was reported into court and entered upon the minutes of the court under the direction of the jury, but thereafter and before the jury was discharged
11 from the case one of the jurors, Mr. Glass, dissented. That at the time said special verdict was reported as aforesaid the court made some remark about whether the jury intended to find the defendant guilty as charged in the first count of the indictment; that as said special finding did not in any manner find the befendant guilty of intending to convert to his own use or gain the alleged stolen property or any part thereof, your affiant understood the remark of the court as meaning, that we could arrive at the same result as our special finding indicated by finding the defendant guility as charged in the first count; that on returning to the jury room your affiant believed, and has reason to believe from the remarks and con-

fellow jurors, believed that the charges against the defendant of intending to convert said alleged stolen property or any part thereof to his own use on gain was not included in the first count of said indictment, and that it was the intent of this affiant, and as he believes of all his fellow jurors, that by returning a verdict of guilty as charged in the first count, they would not find the defendant guilty of intending to convert the property alleged in the indictment to be stolen or any part thereof to his own use or gain: that upon returning to the jury room the last time after having rendered such special verdict as aforesaid, Mr. Glass insisted that he should want to find two of the counts as above indicated against the defendant; that none of said jurors thereupon attempted, or as your affiant has reason to believe, intended to find that the defendant intended to convert said stolen property or any part thereof to his own use or gain; that thereupon we agreed upon the state of facts which we found against the defendant as stated in our special verdict and no more, and
12 thereupon upon coming into court the last time when the verdict of guilty was announced, the foreman of said jury announced said verdict of guilty as charged in the first count; that it was at all times the intent of said foreman and the understanding and agreement of said jurors that said verdict did not and should not exceed in its findings that found in the special verdict and that your affiant never learned until after said jury had been discharged that it was the claim of the prosecution that by returning the verdict of guilty that we in effect found that defendant intended to convert said property to his own use or gain. That if such is the legal effect of said verdict such verdict is a mistake and does not express the facts as agreed to by said jury in the jury room; that said jury never agreed that the said defendant intended to convert said stamps or any part thereof to his own use or gain; your affiant says that in his opinion there was no evidence whatever that would justify him under his oath as a juror either directly or indirectly of finding defendant guilty of intending to convert said stamps or any part thereof to his own use or gain.

E. FERGUSON.

Signed and sworn to befere me this 18th day of June, 1897.
[NOTARIAL SEAL.] S. D. BROWN,
*Notary Public, S. D.*

(Endorsed:) Filed June 22nd, 1897. O. S. Pendar, clerk.

UNITED STATES OF AMERICA, } ss.
*Eighth Judicial Circuit, District of South Dakota,* }

I, Oliver S. Pendar, clerk of the district court of the United States of America, in and for the district of South Dakota, do hereby certify, that I have carefully compared the foregoing copy with the original hereof which is in my custody today as such clerk, and that such copy is a correct transcript from such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Sioux Falls, in said district, this 8th day of December, A. D., 1897.

[SEAL.] OLIVER S. PENDAR,
*Clerk.*

UNITED STATES OF AMERICA, } ss.
*District of South Dakota,* }

In District Court Thereof, Southern Division.

UNITED STATES, }
*vs.* }
JOE KIRBY. }

STATE OF SOUTH DAKOTA, } ss.
*County of Clay.* }

I, the undersigned, being first duly sworn, do on oath depose and say; that I am one of the jurors duly empannelled and sworn and charged in the above entitled action on the 8th day of June, 1897, and that neither the indictment or any copy thereof was furnished to the jury, and that no means was given said jury or any of the
13 jurors by which to determine what was charged in the respective counts thereof; that I heard the word "count" used by the defendant in his objection to the evidence and also heard the word "count" used by the court, and that the court instructed us, as I understood it, that there was four counts therein submitted to the jury on which to pass, and that if we found them all against the defendant we should find him guilty as charged in the indictment that had been read to us; that each of said counts as I understood the court to charge us was as follows:

*First*, Were the stamps mentioned in the indictment stolen from the post office at Highmore?

*Second*, Were the parties who stole the stamps from the post office at Highmore, convicted at Deadwood?

*Third*, Did the defendant receive those stamps knowing them to be stolen?

*Fourth*, Did the defendant intend to convert said stamps to his own use?

That affiant understood that each of said charges as above named constituted a count in said indictment; that upon the jury retiring to deliberate upon the close of the trial, the vote of the jury as to whether we should find the defendant guilty as charged in the indictment, was a major portion of the time six each way, and that part of the time seven of the jury voted "Not Guilty." That said jury and the different members thereof in said voting as your affiant understood it, never intended to find that said defendant ever intended to convert any of said stamps to his own use or gain. That finally, about five o'clock on June 12th, 1897, the jury being unable to agree upon a general verdict, prepared a special verdict, to which in the jury room they all agreed, which special verdict was reported into court and entered upon the minutes of the court under the direction of the jury, but thereafter and before the jury was discharged
14 from the case one of the jurors, Mr. Glass, dissented. That at the time said special verdict was reported as aforesaid the court made some remark about whether the jury intended to find the defendant guilty as charged in the first count of the indictment; that said special finding did not in any manner find the befendant guil-

ty of intending to convert to his own use or gain the alleged stolen property or any part thereof, your affiant understood the remark of the court as meaning, that we could arrive at the same result as our special finding indicated by finding the defendant guility as charged in the first count; that on returning to the jury room your affiant believed, and has reason to believe from the remarks and conversations had with his fellow jurors, that several if not all of his fellow jurors, believed that the charges against the defendant of intending to convert said alleged stolen property or any part thereof to his own use on gain was not included in the first count of said indictment, and that it was the intent of this affiant, and as he believes of all his fellow jurors, that by returning a verdict of guilty as charged in the first count, they would not find the defendant guilty of intending to convert the property alleged in the indictment to be stolen or any part thereof to his own use or gain: that upon returning to the jury room the last time after having rendered such special verdict as aforesaid, Mr. Glass insisted that he should want to find two of the counts as above indicated against the defendant; that none of said jurors thereupon attempted, or as your affiant has reason to believe, intended to find that the defendant intended to convert said stolen property or any part thereof to his own use or gain; that thereupon we agreed upon the state of facts which we found against the defendant as stated in our special verdict and no more, and thereupon upon coming into court the last time when the verdict of guilty was announced, the foreman of said jury announced said verdict of guilty as charged in the first count; that it was at all times the intent of said foreman and the understanding and agreement of said jurors that said verdict did not and should not exceed in its findings that found in the special verdict and that your affiant never learned until after said jury had been discharged that it was the claim of the prosecution that by returning the verdict of guilty that we in effect found that defendant intended to convert said property to his own use or gain. That if such is the legal effect of said verdict such verdict is a mistake and does not express the facts as agreed to by said jury in the jury room; that said jury never agreed that the said defendant intended to convert said stamps or any part thereof to his own use or gain; your affiant says that in his opinion there was no evidence whatever that would justify him under his oath as a juror either directly or indirectly of finding defendant guilty of intending to convert said stamps or any part thereof to his own use or gain.

J. H. DWYER.

Signed and sworn to befere me this 18th day of June, 1897.
[NOTARIAL SEAL.] C. A. CHISTOPHERSON,
*Notary Public, S. D.*

(Endorsed:) Filed June 22nd, 1897. O. S. Pendar, clerk.

UNITED STATES OF AMERICA, }
*Eighth Judicial Circuit, District of South Dakota,* } *ss.*

I, Oliver S. Pendar, clerk of the district court of the United States of America, in and for the district of South Dakota, do here-

by certify, that I have carefully compared the foregoing copy with the original hereof which is in my custody today as such clerk, and that such copy is a correct transcript from such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Sioux Falls, in said district, this 8th day of December, A. D., 1897.

[SEAL.] OLIVER S. PENDAR,
*Clerk.*

UNITED STATES OF AMERICA, *District of South Dakota,* } *ss.*

In District Court Thereof, Southern Division.

UNITED STATES, *vs.* JOE KIRBY.

STATE OF SOUTH DAKOTA, *County of Beadle.* } *ss.*

I, the undersigned, being first duly sworn, do on oath depose and say; that I am one of the jurors duly empannelled and sworn and charged in the above entitled action on the 8th day of June, 1897, and that neither the indictment or any copy thereof was furnished to the jury, and that no means, except the reading of the indict-
16 ment to the jury at opening of trial, was given said jury or any of the jurors by which to determine what was charged in the respective counts thereof; that I heard the word "count" used by the defendant in his objection to the evidence and also heard the word "count" used by the court, and that the court instructed us, as I understood it, that there was four counts therein submitted to the jury on which to pass, and that if we found them all against the defendant we should find him guilty as charged in the indictment that had been read to us; that each of said counts as I understood the court to charge us was as follows:

*First*, Were the stamps mentioned in the indictment stolen from the post office at Highmore?

*Second*, Were the parties who stole the stamps from the post office at Highmore, convicted at Deadwood?

*Third*, Did the defendant receive those stamps knowing them to be stolen?

*Fourth*, Did the defendant intend to convert said stamps to his own use?

That affiant understood that the third paragraph above was the only proposition contained in the first count of said indictment.

That affiant understood that each of said charges as above named constituted a count in said indictment; that upon the jury retiring to deliberate upon the close of the trial, the vote of the jury as to whether we should find the defendant guilty as charged in the indictment, was a major portion of the time six each way, and that part of the time seven of the jury voted "Not Guilty." That said jury and the different members thereof in said voting as your affiant understood

it, never intended to find that said defendant ever intended to convert any of said stamps to his own use or gain. That finally, about five o'clock on June 12th, 1897, the jury being unable to agree upon a general verdict, prepared a special verdict, to which in the jury room they all agreed, which special verdict was reported into court and entered upon the minutes of the court under the direction of the jury, but thereafter and before the jury was discharged
18 from the case one of the jurors, Mr. Glass, dissented. That at the time said special verdict was reported as aforesaid the court made some remark about whether the jury intended to find the defendant guilty as charged in the first count of the indictment; that as said special finding did not in any manner find the befendant guilty of intending to convert to his own use or gain the alleged stolen property or any part thereof, your affiant understood the remark of the court as meaning, that we could arrive at the same result as our special finding indicated by finding the defendant guility as charged in the first count; that on returning to the jury room your affiant believed, and has reason to believe from the remarks and conversations had with his fellow jurors, that several if not all of his fellow jurors, believed that the charges against the defendant of intending to convert said alleged stolen property or any part thereof to his own use on gain was not included in the first count of said indictment, and that it was the intent of this affiant, and as he believes of all his fellow jurors, that by returning a verdict of guilty as charged in the first count, they would not find the defendant guilty of intending to convert the property alleged in the indictment
19 to be stolen or any part thereof to his own use or gain.

That your affiant says in his opinion there was no evidence whatever that would justify him under his oath as a juror either directly or indirectly of finding said defendant Joe Kirby guilty of intending to convert the said property alleged to be stolen to his own use or any part thereof, but that your affiant does believe and did believe at the time from the evidence that the said defendant did not at any time intend to convert said property to his own use, gain or otherwise; that after said jury had been discharged on the morning of June 16th, 1897, your affiant learned for the first time when the affidavit was presented to him that it was the claim of the prosecution that the verdict as returned by said jury in effect found the defendant guilty among other things of intending to convert said property to his own use or gain; that if such is the legal effect of such verdict, such verdict is a mistake and fails to express the intent of the jury when the same was returned; that had the affiant understood that the charge of having said property with intent to convert the same to his own use and gain was contained in the first count of said indictment your affiant would never have consented to such a verdict, and, in order that justice may be done, your affiant is ready and willing to appear in open court and does hereby offer to appear in open court to testify as to the matters and things aforesaid.

That I have read the foregoing affidavit and that the same is in all respects true and as I desire it to be made.

JOSEPH A. COLEND.

Signed and sworn to before me this 16th day of June, 1897.
[NOTARIAL SEAL.] FRED. E. GRANT,
*Notary Public, S. D.*

(Endorsed:) Filed June 22nd, 1897. O. S. Pendar, clerk.

UNITED STATES OF AMERICA,
*Eighth Judicial Circuit, District of South Dakota,* } *ss.*

I, Oliver S. Pendar, clerk of the district court of the United States of America, in and for the district of South Dakota, do here by certify, that I have carefully compared the foregoing copy with the original hereof which is in my custody today as such clerk, and that such copy is a correct transcript from such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Sioux Falls, in said district, this 8th day of December, A. D., 1897.

[SEAL.] OLIVER S. PENDAR,
*Clerk.*

UNITED STATES OF AMERICA,
*In Supreme Court.*

JOE KIRBY, *Plaintiff in Error,*
*vs.*
UNITED STATES,

STATE OF SOUTH DAKOTA,
*County of Minnehaha.* } *ss.*

We, the undersigned, being each duly and severally sworn, do, each for himself, depose and say:

That I am an attorney and counsellor at law and as such engaged in the active practice of my profession, and as such appeared for the said Plaintiff in Error, Joe Kirby, in the trial court, and conducted his defense therein, and that I have persoonal knowledge of the facts herein stated. That the record as printed for this court, a copy of which is now before me, shows that the plea of former jeopardy interposed on the part of the Plaintiff in Error, and which plea was in writing, was not so presented until after the trial jury had been empanneled and charged with the case. That said record is in this respect incorrect. That immediately on June 8th, 1897, upon said action being called and before a jury was called for the trial of said action, the said plea of former jeopardy as appears by pages 16 and 17 of the printed record was presented to the court and filed with the clerk and the questions raised thereby ruled upon by the court and exception taken and allowedto such ruling before the jury was called for the trial of this action.

FRANK R. AIKENS.
D. R. BAILEY.

Subscribed and sworn to before me this 31st, day of August, 1898.
[SEAL, NOTARY PUBLIC.] H. E. JUDGE,
*Notary Public.*